Mojave Electric Cooperative, Inc. *and* International Brotherhood of Electrical Workers, Local 769, AFL–CIO. Case 28–CA–13749

October 30, 1998

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On September 26, 1997, Administrative Law Judge Frederick C. Herzog issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order, as modified and set forth in full below.[3]

In affirming the judge's conclusion that the Respondent unlawfully discharged employee Richard Michaels in violation of Section 8(a)(1), we rely on findings that: (1) Michaels and fellow employee Stuart Douglas were engaged in actual protected concerted activity when, pursuant to a common concern for their workplace safety, they both petitioned for injunctive relief against harassment by two officials of the Respondent's subcontractor; (2) the Respondent undisputedly discharged Michaels because he filed for an injunction; and (3) Michaels' actions did not lose their protection under the Act because they constituted disloyalty within the meaning of *NLRB v. Local 1239 (Jefferson Standard)*, 346 U.S. 464 (1953). We find no need to rely on the judge's conclusion that the discharge also violated Section 8(a)(3) of the Act, and we shall delete references to antiunion discrimination from the remedial Order and notice language.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Mojave Electric Cooperative, Inc., Bullhead City, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because they have engaged in protected concerted activities during the exercise of rights guaranteed by Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative actions necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Richard Michaels full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Richard Michaels whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify Richard Michaels in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Bullhead City, Arizona, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 3, 1996.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region at-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In adopting the judge's finding that employee Richard Michaels did not lose his reinstatement rights we note that the judge credited the testimony of Michaels over Tammy Bauguess. (Indeed, the judge generally stated that he was "well impressed by the testimonial demeanor of Michaels.") We do not rely either on the judge's statement that Bauguess was an employee of an employer which had a clear economic interest in the outcome of the case or on the judge's characterization of David Drabek as having an "economic interest in seeing Michaels lose both his job and this litigation."

[3] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgement of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

testing to the steps that the Respondent has taken to comply.

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights:

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge employees because they have engaged in protected concerted activities during the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Richard Michaels full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Richard Michaels whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Richard Michaels, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

MOJAVE ELECTRIC COOPERATIVE, INC.

Nathan W. Albright, Esq., for the General Counsel.
Robert J. Deeny, Esq. and *John K. Ausdemore, Esq. (Snell & Wilmer),* for the Respondent.
Joel Bell, Esq., of Phoenix, Arizona, for the Charging Party.

DECISION

STATEMENT OF THE CASE

FREDERICK C. HERZOG, Administrative Law Judge. This case was heard by me in Las Vegas, Nevada, on March 25 and 26, 1997, and is based on a charge (subsequently amended) filed by International Brotherhood of Electrical Workers, Local 769, AFL–CIO (the Union), on June 10, 1996, alleging generally that Mojave Electric Company, Inc. (Respondent) committed certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) (29 U.S.C. §151 et seq.). On July 25, 1996, the Regional Director for Region 28 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging violations of Section 8(a)(1) of the Act, and on December 19, 1996, he issued an amended complaint, adding an allegation of a violation of Section 8(a)(3) of the Act. Respondent filed timely answers to the allegations contained within the complaint and the amended complaint, denying all wrongdoing.

All parties appeared at the hearing, and were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally and file briefs. Based on the record, my consideration of the briefs filed by counsel for the General Counsel and counsel for Respondent, and my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The amended complaint alleges, and Respondent's answer admits, that Respondent is an Arizona corporation, with an office and place of business in Bullhead City, Arizona, where at all times material it has been engaged in the business of the sale and distribution of electricity; that during the 12-month period year ending June 10, 1996, in the course and conduct of its business operations, it derived gross revenues in excess of $250,000, and that, during the same period, it purchased and received in interstate commerce at its facility mentioned above goods valued in excess of $50,000 directly from points outside the State of Arizona.

Accordingly, I find and conclude that Respondent is now, and at all times material has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that the Union is now, and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Issue

This case arises from Respondent's action in discharging an employee named Richard Michaels on or about June 3, 1996.

Counsel for the General Counsel asserts that Respondent's action was taken on account of Michael's protected, concerted activities, and because of his support for the Union. Respondent asserts, to the contrary, that Michaels was discharged for valid cause, and, in the alternative, that he would have been discharged in any event regardless of the General Counsel's proof.

B. General Background and Labor Relations History

Respondent is a utility operating in Arizona. It employs approximately 70 employees. The Union was elected in 1992, and since 1993 roughly 20 of Respondent's employees have been represented for purposes of collective bargaining by the

Union in a unit comprised of linemen, meter readers, mechanics, and warehouseman.[2] The meter readers department consists of approximately 8 to 12 employees, whose responsibilities include meter reading, meter installation, connection, and deconnection of electrical meters, and other related duties. All meter readers, including those employed by any subcontractor, are supervised by one Gene Quinn. Tom Longtin is Respondent's operations manager. Lisa Crutchfield is employed as Respondent's manager of human resources.

Respondent uses subcontractors to provide services from time to time, consistent with its right to subcontract under the collective-bargaining agreement. One example is Jay Lang Construction, which performs construction of power lines.

Another example is found in Respondent's use of a contractor named Guard Force, which provides employees for meter reading. Guard Force is the only contractor that Respondent uses on a regular and continuing basis.

Unlike Respondent's unit employees, the Guard Force employees duties are strictly limited to meter reading. Guard Force has been supplying Mohave with meter readers for approximately 3 years. Jay Nady is the owner and manager of Guard Force. David Drabek,[3] as Guard Force's supervisor at Mohave, is responsible for training, supervising (subordinate to Gene Quinn), and overseeing Guard Forces operations at Mohave. The Guard Force employees wear shirts and caps which identify them as Respondent's meter readers, just like Respondent's own employees.

C. Michaels' Discharge

Richard Michaels was a member of the unit and worked as a meter reader during his entire term of employment with Mohave, from August 26, 1991, through his termination date on June 3, 1996. Michaels and Scott Archibeque were the two union stewards at Mohave, and was serving in that capacity on the date of his discharge. Although Michaels was on the Union's negotiating committee for 3 years, including on the date of his discharge, his only role as a negotiator was to attend a single meeting in 1996, which occurred subsequent to his termination. Respondent's contract with the Union expired on June 1, 1996.

Prior to May 8, 1996, Michaels' work history was generally uneventful. Even after that date, Michaels was never warned about any deficiencies in his work. At trial Respondent acknowledged that Michaels was not discharged on account of any event which occurred prior to May 8, 1996.

On the morning of May 8, 1996, Michaels spoke by phone with Drabek. The conversation was occasioned by a Guard Force employee having insisted that Michaels trade his meter reading route to him for the day. Michaels refused, since that was contrary to standing instructions by Quinn. Michaels told Drabek of that instruction. Nevertheless, Drabek reported to Respondent that Michaels had been rude to him. When Quinn inquired into the flap, Michaels told him that he'd merely acted in accordance with Quinn's instructions. Michaels added that he had not been rude, and that his version could be supported by other employees who had been nearby, allowing them to overhear the conversation between him and Drabek. Quinn ended the matter by commenting that Michaels had acted properly. Nevertheless, Quinn also advised Michaels that Longtin wanted him to issue Michaels a written reprimand on account of the matter.

Later, in mid-May, a friend of Michaels reported to him that an individual wearing a shirt of Respondent's had been stopped at a local grocery store for shoplifting. Michaels reported this to Quinn, who said he'd check into it.

Quinn, however, testified that Michaels told him that a Guard Force employee had been arrested for shoplifting, handcuffed, and driven away from the grocery store by the police. Quinn testified that he then notified Nady and Longtin of the incident.[4] Longtin's testimony was that he concluded that Michaels exaggerated this incident to the point that it amounted to a deliberately malicious report.

Nady's investigation of the matter led to a conclusion consistent with the version of the incident supplied at trial by Michaels.[5] Further, Respondent's own rules require that employees report any such incident to Respondent.

I was well impressed by the testimonial demeanor of Michaels. I find that it was superior to that of either Quinn or Longtin, and have, accordingly, determined to credit his version of events in this case (including his conversation with Quinn), over that of Quinn or Longtin wherever those versions are in conflict. Quinn was repeatedly vague, evasive, and halting in his testimony. Longtin was bluff and confident, to the point of exhibiting arrogance, and disdain for the entire trial process.

While it may possibly be that Longtin's conclusion that Michaels intended by his report to Quinn to create "artificial tensions," was based in good faith on the reports given him by his intermediaries, his personal good faith cannot serve to validate the fact that it was his own supervisors, and not Michaels, who did the exaggerating, thereby causing him to act against Michaels on the basis of a false report. Thus, it is clear that it is Respondent, and not Michaels, who must bear the responsibility for any exaggeration done with respect to this particular incident. Accordingly, I conclude and find that this incident cannot serve as evidence, as argued by Respondent, of Michaels engagement in a long campaign to "engineer" the removal of Guard Force as a subcontractor for Respondent.[6]

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[2] Respondent's handbook for employees, however, still contains the following language:

> **WHAT YOU CAN EXPECT FROM US . . . .**
>
> **OPEN SHOP PHILOSOPHY AND PRACTICES**
>
> **WE PREFER TO DEAL WITH PEOPLE DIRECTLY RATHER THAN THROUGH A THIRD PARTY, THIS MEANS THAT WE PREFER TO WORK DIRECTLY WITH YOU AS AN EMPLOYEE WITHOUT INTER-VENTION OF OUTSIDERS.**

[3] Sometimes spelled as "Drabaugh" in the transcript.

[4] Nady testified that Quinn told Drabek of the incident, but Quinn denied it. Drabek, though called as a witness by Respondent, was not asked about the matter.

[5] It was determined that the store's security force, not the police, had "flagged down" and detained an individual who had "forgotten" to pay for some cold medicine. His memory refreshed by his return to the store, the individual evidently paid for the product and was allowed to go on his way following the "mistake."

[6] Indeed, while it is not essential to the disposition of this case, I find that Respondent's claim that Michaels was intent on the severance of the contractual relationship it had with Guard Force has not been supported. Instead, from all that is in this record, I can go no further than to find that Michaels was long concerned with, and intent upon, protecting the jobs of unit employees. Such an objective, of course, is fully consistent with his retention of protections under the Act.

According to Respondent, Michaels had a long-running personal controversy with the owner of Guard Force, Jay Nady, and this incident is one example of its fallout. Respondent contends that this controversy is evidenced by several unfriendly encounters outside the workplace. First, Michaels testified that he had a discussion with Nady, outside the workplace, in which Nady told him he should find a new job because he was obsolete, and his time as a meter reader was limited. Second, Nady testified that Michaels made inappropriate comments to him outside the workplace. For instance, Nady testified that Michaels referred to Guard Force employees as scabs and commented that Nady was out to get his job. Nady also testified that he believed Michaels didn't like him. According to Respondent, along with his dislike for Nady, Michaels held a firm belief that his job was in jeopardy because Respondent's use of Guard Force and Nady.

Respondent further contends that because of Michaels' personal belief that Guard Force somehow posed a threat to his job, Michaels engaged in a campaign to have Guard Force removed as Mohave's contractor, despite the fact that Mohave had the right to subcontract and the parties' collective-bargaining agreement strictly prohibits such interference, stating in pertinent part:

> During the term of this Agreement, under no circumstances will the Union or the employees engage in . . . interference of any kind with the operations of the Employer.

In any event, the "shoplifting incident" led directly to the immediate events which precipitated Michaels' discharge.

For, on May 21, angry over the alleged exaggeration by Michaels, Nady went to Respondent's premises to confront and "straighten out" Michaels. Nady, unable to find Michaels,[7] came across employee Stuart Douglas. According to the notes of Crutchfield, who "investigated" the incident, Douglas claimed that he'd been physically and verbally assaulted by Nady, with Nady grabbing him by the shirt and shaking him. Douglas' account was generally corroborated by that of an employee named McArthur. Nady denied this, and claimed that any contact was merely incidental to being bumped as both were leaving the meter reading room. Drabek corroborated Nady's account.

Inasmuch as these events (while "about" Michaels), did not involve Michaels, it is not necessary to resolve the conflicts between the testimony concerning them.

What is important about the incident of May 21 is the series of events which they precipitated. On the very next day Michaels (when he was told by Douglas of the events of the previous day), told Quinn that he felt threatened by Nady.[8] Michaels asked Quinn for protection, and Quinn asked him to give it a couple of days. However, Longtin did later have a talk with Nady, advising him that Respondent reserved to itself any issues of supervision or discipline of its employees.

Instead, on May 23, Michaels and Douglas went to the Bullhead City municipal court, where they filed petitions for injunction against harassment, naming Nady and Drabek as the persons against whom protection was sought. The petitions referred to the May 8 telephone conversation between Drabek and Michaels, and the alleged assault against Douglas of May 21. The petitions requested that Nady and Drabek have no contact with Douglas and Michaels, and that they be enjoined to stay away from Michaels home and his place of employment.[9] Prior to filing his petition, Michaels spoke of filing with fellow employees and he testified without contradiction that the other employees supported his position. Thus, I find that Michaels satisfied the first requirement of *Meyers Industries*, 268 NLRB 493, 497 (1980), that his activities were engaged in on or with the authority of other employees and not solely on behalf of himself. The effort of Michaels to compel greater physical safety for himself and other employees of Respondent falls with the Board's requirements, and an employee cannot be discharged for engaging in such activity. *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978).

Respondent became aware of the petitions no later than May 29, when Nady delivered copies of them to Longtin. Significantly, Respondent took no action and made no effort to avoid or lessen any impact that the petition might have been anticipated at that time to have on its business, or its freedom to contract. Specifically, when Michaels offered to withdraw his petition when he spoke to Crutchfield, instead of being taken up on his offer, he was merely told that Crutchfield couldn't go into specifics.[10] Nor did Respondent undertake to even try to get the city court to deny the petition, or to structure it in such a way as not to interfere with its business (as I have little doubt the court would have been willing, and easily able to do).

Michaels attempted on May 24 to file a grievance regarding the incident of May 21, by handing it to Quinn. The grievance specifically requested that Guard Force be removed from Respondent's property. However, Longtin refused to accept the grievance, on the basis that the collective-bargaining agreement provided that grievances could be filed only with Longtin.

Counsel for the General Counsel argues that I should find this refusal to be clear evidence of animus. The collective-bargaining agreement specifically states that grievances are to be "submitted . . . to immediate Supervisor." Since Glenn was Michaels' immediate supervisor, it follows, so the General Counsel argues, that Respondent had no basis to reject Michaels' grievance, and that I should infer that its action in doing so evidences an antipathy toward unionism in general, and hostility toward Michaels' engagement in union activities in particular.

However, that argument ignores the fact that Longtin credibly testified, without contradiction, that because problems had been experienced in the transmission of grievances to him by the immediate supervisors, he and the Union's grievance committee reached a subsequent oral agreement providing that all grievances must be submitted directly to Longtin. He further testified that all that would have been necessary for the consid-

[7] Michaels was not even on the premises at the time.

[8] Nady is an imposing physical specimen, indeed, but gave no hint in his demeanor of an aggressive nature.

[9] The court eventually denied the petitions for injunction, by order dated July 29, 1996.

[10] Longtin was dismissive of Michaels offer to withdraw his petition. He explained his viewpoint to me by stating, "[I]t was just one thing after another." I specifically find this particular statement by Longtin to be utterly incredible. For, had this simple offer by Michaels been accepted, the primary reason for Respondent's discontent with Michaels would, perforce, have vanished. I infer therefrom that Longtin desired that the controversy remain alive, so as to afford him what he regarded as just cause to discharge Michaels. Such a motivation, of course, infects and invalidates all of Respondent's reasons for discharging Michaels, and provides clear evidence of animus, as well as severely tainting Longtin's credibility.

eration of Michaels' grievance would have been for him to take it back from Glenn and hand it to Longtin himself. Since I credit Longtin's testimony regarding this matter I find that the refusal of Glenn to accept the grievance, or of Longtin to process it, was of no legal significance to this case's outcome. I cannot agree that it amounted to no more than requiring legalistic "hoop jumping" of Michaels by Respondent, as the General Counsel argues, since I have no basis for lightly discounting whatever difficulties had been experienced in the past in processing grievances, as testified to by Longtin. In fact, Michaels' fellow steward, Archibeque, did refile Michaels' grievance, and it was apparently timely processed.[11]

Following receipt of a phone call from Michaels' wife (expressing her concern over her husband's anxiety concerning the possibility of losing his job), on May 28 Respondent, through Crutchfield, called Michaels in for a discussion. The subject of his anxiety about losing his job was responded to by Respondent advising him to seek counseling. Michaels apparently spoke at some length about his concerns, including the fears that Guard Force posed a threat to the job security of meter readers employed by Respondent. He also discussed his view that it was necessary for him to file some sort of civil action regarding the threat he felt from Nady's direction. At one point Michaels offered to withdraw his petition. In the end, Crutchfield advised him that she could not discuss specific matters, such as what Longtin may have told Nady.

On May 29 Longtin received a copy of the petition for injunction from Nady. He then met with Crutchfield and McArthur, and discussed the matter. At that time Longtin reached a decision to discharge Michaels. He testified that his reasons for doing so were:

- Michaels calling an employee of Guard Force a scab.[12]
- The telephone confrontation with Drabek.
- The "shoplifting" incident.
- Michaels' attempt to stop Respondent from doing business with Guard Force (i.e., the petition).

On June 3, Longtin discharged Michaels. Longtin told Michaels that the action he'd taken regarding the petition tended to interfere with Respondent's ability to do business with Guard Force, and that it was the reason underlying his discharge. At trial Longtin testified that he told Michaels of no other reason besides his having filed the petition, which would act as a bar to Respondent doing business with Guard Force.

D. Analysis and Conclusions

The General Counsel alleges that Respondent discharged Michaels because of its antiunion animus, his participation in protected activity, and his prounion stance and activities, thus raising the 8(a)(3) claim. Respondent denies any wrongdoing on its part in letting the Michaels go and asserts that the Michaels' prounion sentiment was not a factor in its decision. Respondent further claims that Michaels would have been fired anyway based on evidence of misconduct discovered by it after his discharge.

Thus, it is clear that the governing law in this case is *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1983). There, the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation.

- First, the General Counsel must make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision.
- Second, upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Corp*., 462 U.S. 393, 399–403 (1983).

In this case I conclude that the General Counsel has made a prima facie case that Michaels was discharged because of his participation in protected activities during the few weeks preceding his termination. That timing, taken together with Respondent's statements of its admitted aversion to the cause of unionism, are sufficient unto themselves to make out the elements of such a case.

Accordingly, I now turn to the issue of whether or not Respondent has succeeded in its efforts to prove that Michaels would have been discharged in any event, even absent his engagement in protected and union activities.

The issues of the case are essentially factual. The credibility of both the General Counsel's and Respondent's witnesses and the facts they have testified to are of paramount importance, especially as major conflict between the testimonies exists. The demeanor of the witnesses that I observed during the hearing, as well as the facts they attested to, determine my findings of fact on the disputed events of this case. From the General Counsel's side, the primary witness is Michaels. From Respondent's side, the primary witnesses to disputed matters are Quinn and Longtin. As I have already stated, of the three witnesses, Michaels was the superior, and has been credited wherever their versions are in conflict.

Respondent has pointed to a series of mistakes and problems Michaels to account for its actions.

First, when Michaels was confronted on the telephone by Drabek, a supervisor of Guard Force, he did tell the man of his position that the request made by a Guard Force employee to switch assignments was contrary to Respondent's standing instructions. After Drabek's complaint to Respondent of having been spoken to rudely, Michaels first denied the charge, and went on to offer to have his truthfulness borne out by witnesses. In the end, despite the fact that his own supervisor told him that he'd done the right thing, the supervisor advised him that Longtin still wanted him to be disciplined. This desire of Longtin's to punish Michaels, despite the evidence showing no misconduct by Michaels, leads me to infer that Michaels' union activities had attracted Longtin's attention, and aroused his ire.

Further, that Respondent would discharge Michaels, previously regarded as a satisfactory employee, within 1 month of

[11] I do note, however, that, while I cannot find that Respondent's refusal to accept the grievance as originally presented evidences animus, it was certainly not inconsistent with the presence of animus.

[12] Inconsistently, Longtin testified that this sort of name calling all occurred before May 8, 1995. In the face of the earlier stipulation and testimony to the clear effect that Michaels was not disciplined on account of any event which occurred before that date, I find this addition to Longtin's list of causes to be nothing more than makeweight. Moreover, I found Michaels denial that he'd ever called any employees of Guard Force scabs to be credible.

Michaels having reported an incident involving an employee of Guard Force for having been detained on suspicion of shoplifting seems suspiciously contrived, in and of itself. After all, it is undisputed that Respondent's own policy that such incidents are to be reported to Respondent. Thus, Michaels was clearly acting properly when he made a report of the incident. The fact that Michaels was charged with having exaggerated and magnified the incident, when, in fact, it was Respondent's own supervisors who did so, serves only to deepen and harden the suspicions created in me by Respondent.

Finally, Michaels' testimony is unrebutted that he spoke to several employees prior to filing his petition for an injunction in the city court, and that he was successful in soliciting their support for his action. Quite obviously, he succeeded with at least one fellow employee, Douglas, who joined him in filing a petition. Precisely, the very subject matter of the petition was the personal safety of employees from assault while at work.

Respondent is not free to deal with Michaels' as though in a vacuum, despite Michaels' seeming willingness to interfere with its ability to run its business as it saw fit by having filed his petition. As I have noted above, Nady did behave toward Michaels' in an angry fashion, and did seek to find him for some sort of confrontation. Whether it would have proven to be a physical confrontation can never be known. But, two things are clearly true: (1) Nady's imposing size and evident state of fitness would strike a disturbing chord in virtually any man who learned as Michaels did that Nady had come onto Respondent's premises seeking a confrontation with him;[13] and (2) Michaels sought assurances for his safety from Respondent, (both with his own supervisor and with Crutchfield), and he resorted to the filing of a petition only after such assurances were not given.

The General Counsel must establish unlawful motive or union animus as part of his prima facie case. If the unlawful purpose is not present or implied, the employer's conduct does not violate the Act. *Abbey Island Park Manor*, 267 NLRB 163 (1983); *Howard Johnson Co.,* 209 NLRB 1122 (1974). However, direct evidence of union animus is not necessary to support a finding of discrimination. The motive may be inferred from the totality of the circumstances proved. *Fluor Daniel, Inc*., 311 NLRB 498 (1993); *Associacion Hospital del Maestro*, 291 NLRB 198, 204 (1988). I regard the findings above, such as Respondent's exaggeration of the circumstances of the "shoplifting incident," and desire of Respondent to issue Michaels a warning despite the finding of his supervisor that he'd acted properly, are evidence of animus on the part of Respondent. Taken together with the demonstrable willingness of Respondent to retaliate for his engagement in protected activity, and considering how all of these events took place in a short time following his engagement in proper, protected and/or union activity, I find and conclude that the General Counsel has satisfied the requirement of demonstrating animus on the part of Respondent.

Additionally, it is axiomatic that an employer's distortion and magnification of an employee's deficiencies casts a deep shadow over any claim that mere business judgment was involved in the employee's termination *U.S. Postal Service*, 256 NLRB 736, 738 (1981). I find and conclude this axiom has application here. Respondent's recitation of such a list of transgressions by Michaels, an admitted good employee, is properly viewed by me as further evidence of animus, and an intent to retaliate.

I cannot find, as Respondent urges, that Michaels actions were unprotected because they constituted "disloyalty." Unlike in *NLRB v. Local 1239 (Jefferson Standard),* 346 U.S. 464 (1953), Michaels' action here was tied directly to his working conditions and his attempt to reach a resolution of a dispute involving such conditions.

Nor does *NLRB v. Knuth Bros., Inc*., 537 F.2d 950 (7th Cir. 1976), require the result sought by Respondent. This record, unlike in *Knuth*, is completely silent regarding any claim that Michaels disclosed any confidential materials of Respondent's.

It is clear that, regardless of whether or not one regards Michaels' fears as totally realistic, it is not possible to state with certainty that they were baseless. Thus, it cannot be said that they do not warrant protection under the Act. It follows, therefore, that since Respondent admittedly fired him, at least in part, because of his having filed the petition, Michaels was illegally discharged, whether viewed as a violation of Section 8(a)(1) or (3) of the Act. I so find and conclude.

Thus, summarizing, I find and conclude that the General Counsel has made out a prima facie showing of illegal motivation in Michaels' discharge, and I further find and conclude that Respondent's evidence has failed to overcome the General Counsel's case.

E. Respondent's Allegations Regarding the Remedy

Ordinarily, the inquiry in a case of this sort would end at this point. However, in this particular case, Respondent has come forward with further evidence. That evidence is offered by Respondent as proof of further claimed misconduct by Michaels which would justify his discharge, and warrant refusal to reinstate him. It is claimed by Respondent that this evidence was not discovered by it until after Michaels was discharged.

Obviously, the burden of proof regarding such evidence must be placed on the party who offers it, the Respondent.

The obvious beginning point of any examination of an employer's defenses is to look at the employer's stated reasons for its actions. This is so because, even in cases where valid grounds for discipline exist, an employer may neither use such grounds as a pretext for discrimination nor use them to bolster disciplinary actions undertaken on some other original basis. For, it is the "real motive" of the employer which is decisive. *NLRB v. Brown*, 380 U.S. 278, 287 (1965); *NLRB v. Great Dane Trailers, Inc.,* 388 U.S. 26 (1967). In light of my findings above, that Respondent harbors animus and discriminatory intent toward Michaels and unionism, I have deemed it appropriate to examine such evidence with great care, and with no small amount of suspicion.

The evidence claimed to support Respondent's contention is summarized, though never examined in detail, by Respondent in its brief, as follows:

> Mohave provided evidence that Michaels paid a Guard Force employee $5.00 to cover his route as well as paid Mohave employees a $10.00 bribe to accept his difficult assignments. The $5.00 payment to the Guard Force employee came to Mohave's attention approximately one week after Michael's

[13] As I have stated, Nady gave no evidence of possessing a physically aggressive nature at trial. However, I have no way of assessing his demeanor when he went to Respondent's premises to seek out Michaels. Thus, while I feel unable to accurately assess whether or not Michaels' fears of being physically harmed by Nady were totally realistic, it suffices for purposes of this decision that I cannot find such fears so unreasonable or exaggerated as to have been utterly groundless.

termination. Mohave learned about the frequent $10.00 bribes one day before this hearing. Mohave's Operations Manager, Tom Longtin testified Michaels would have been terminated for this conduct.

Based on these "facts," Respondent then goes in its brief, to argue, as follows:

> An employee who has been discharged in violation of the Act is not barred from all relief when, after his discharge, the employer discovers evidence of wrongdoing that, in any event, would have led to his termination on lawful and legitimate grounds had the employer known of it. *McKennon v. Nashville Banner Publishing Co.,* 513 U.S. 352 (1994); *Cook Family Foods, Inc.,* 1996 NLRB LEXIS 404 (1996); *Marshall Durbin Poultry Co.,* 310 NLRB 68 (1993). However, after acquired evidence of the employees wrongdoing must be taken into account in determining the specific remedy, lest the employers legitimate concerns be ignored. Id. Once an employer learns about employee wrongdoing that would lead to legitimate discharge, the calculation of damages should be limited to back pay from the date of the unlawful discharge to the date the new information was discovered and *eliminates reinstatement as a remedy. Cook Family Foods* at 25; *Whitehall Packing Co., Inc.,* 257 NLRB 193 (1991). [Emphasis as shown in Respondent's brief.]

In fact, Longtin testified regarding the after-acquired evidence, that sometime shortly after Michaels had been discharged, Nady reported to him that Michaels had paid another employee, Tammy Bauguess, (who, in fact, worked for Guard Force), to have her read the meters that he was assigned to read. Longtin said that he didn't inquire into the question of how many times this had occurred, but that he later learned that it had occurred only once between Michaels and Bauguess. However, he also related that she told him that Michaels and two other employees of Respondent's (including Stuart Douglas and someone named Adam) ad on more than one occasion paid each other to take lesser jobs if one didn't want to read meters on a particular date. Longtin said that Bauguess denied that she'd ever seen money exchanged by the employees, though he "believed" that Drabek had told him that he'd seen it.

When Longtin later inquired about these incidents with Quinn, who had been the employees' supervisor, Quinn not only stated that he'd had no knowledge of the matter, but went further and stated that he knew that no such incidents had occurred. Longtin allowed as how, if he had discovered that any such practice had been going on by an employee of Guard Force, he'd "probably" have demanded their discharge. Yet, Longtin's testimony on this point was belied by his further testimony, in which he admitted that he'd "not at this time" recommended or demanded that Guard Force discipline Bauguess for engaging in the conduct which she'd testified about.

Tammy Bauguess testified that she is an employee of Guard Force, as she has been for over a year. She stated that she was trained as a meter reader by Stuart Douglas, but that he was a bully and actually trained her incorrectly, evidently purposefully. She also recalled that once, approximately in August or September of 1995, as she was supposed to learn an additional route, Michaels was supposed to train her, by showing her the route. She went on to testify that, as they neared the end of the route, Michaels wanted her to read one side of the block they were on while he read the other. She testified that, since Michaels knew that she was paid 25 cents for each meter she read, he paid her $5 for her work of reading the meters on one side of the street in that block.[14] She stated that this occurred only once, and that Michaels' supervisor, Quinn, did not know of it.

In fact, Bauguess has never been disciplined for having accepted money from Michaels to read meters on his route, despite the admission of Drabek that she'd told him of the incident over a year before.

Drabek also testified that he'd many times witnessed the fact that Michaels and employee Nikander switched jobs, and that he'd known about this for about a year. He went on to testify that he'd once seen money, $10, exchanged between Michaels and Nikander. Despite all this, he testified that he never reported the matters to anyone, and that he never took any action himself to stop it, because they were employees of Respondent. Drabek was extremely hesitant and halting when it was later inquired into about when he'd reported the job-switching between Michaels and Nikander.

Longtin also testified that, it was only days before the trial, during the course of "visiting" with employees of Guard Force, (Drabek and Bauguess), he'd first discovered that Michaels had paid other employees of Respondent to switch routes, or to make his own route easier. Longtin explained the importance and purpose behind Respondent's prohibition of any such practice as allowing Respondent to account for the whereabouts of its employees in case a question of legal liability for property damage or theft arises.

Quinn testified regarding these matters, also. However, contrary to Longtin's, his testimony was that as the immediate supervisor of the meter readers, there was no problem that he saw when employees switched off doing jobs for one another, such as meter reading or service jobs. He testified that switching was a common occurrence, and that all he required was that it be disclosed to him, so that he could advise the dispatcher. Quinn credibly denied knowing of any payment by Michaels to Bauguess, or of any switching of jobs from Michaels to Bauguess.

Regarding the "after-acquired" evidence, Michaels credibly testified that the only such incident that ever occurred involving the payment of money was once when Drabek, Guard Force's supervisor, once, around March or April 1996, offered to pay him, or Stuart Douglas, or employee Nikander, $20 to read his route for him while Drabek was away in Gillette, Wyoming to attend a job interview which he didn't wish to disclose to Nady. Michaels credibly testified that he wouldn't do it, though he had no knowledge as to the responses of Douglas or Nikander.[15] Michaels readily admitted that he'd quite frequently switched jobs with employees Douglas and/or Nikander, but that, just as Quinn testified that he required, they had always done this by reporting what they were doing to Quinn and to

[14] As I stated at trial, should any such conduct have occurred, I would assume that employees shouldn't do that sort of thing. However, as I also stated at trial, in light of the General Counsel's argument that Respondent intended to use such evidence as a complete defense to reinstatement, I would and do accept further evidence concerning the details of the occurrence, so as to properly evaluate it, and give it the proper weight.

[15] Drabek testified haltingly, "No, not to my recollection, no." when he was asked if he'd ever asked Michaels to cover for him and to pay him $20 so that he could leave for the airport. He did, however, acknowledge that he had flown to Gillette, Wyoming.

I credit Michaels' version of this incident.

the dispatcher. Michaels went on to credibly recount that the only money that changed hands was when one or another of them would buy lunch for the other(s), or would engage in trading of baseball cards, which they each collected as a hobby.

The testimony of Drabek is suspect, and will not support the conclusion drawn from it by Longtin that Michaels and other employees of Respondent engaged in the practice of switching jobs in exchange for the payment of money. First, Drabek, as a supervisor of Guard Force, has a clear economic interest in seeing Michaels lose both his job and this litigation. Second, as I have already found, Drabek himself once solicited the very sort of conduct which he now accuses Michaels of engaging in. Third, Drabek has not been disciplined by his employer, nor has Respondent requested any such action so far as the record shows, despite his testimony that he know of Michaels' "misconduct" for over a year, and took no action to either stop it or to report it to responsible officials. Fourth, it cannot be established that what Drabek claims to have seen even constituted misconduct. The employees' own supervisor admitted that he had full knowledge of all the many switches in jobs that the men engaged in, and that he found that practice to be perfectly acceptable, so long as it went through him and was reported to dispatch, which, by all evidence, it was. Thus, by definition, none of these alleged matters constituted misconduct.

I find and conclude that the alleged job switching between Michaels and other employees of Respondent, including either Douglas or Nikander, is insufficiently proven by Respondent, and will not support a finding that he should be denied reinstatement.

That leaves Respondent with but one allegation, i.e. that Michaels once, about 10 to 11 months preceding his discharge, paid an employee of a contractor the sum of $5 to perform the task of reading the meters in one particular block along one side of the street.

Michaels has credibly denied that he ever paid anyone to do any such thing.

Thus, while it is not possible to ever know with certainty just which of the two, Michaels or Bauguess, testified with greater veracity or accuracy, it is necessary to resolve this issue. As I have stated, Michaels was a quite credible witness, and I have determined to credit his version of this matter. I do not find that Bauguess was untruthful. But, I do bear in mind that she remains an employee of an employer which has a clear economic interest in the outcome of this case, and I decide that, of the two versions, I accept that of Michaels more readily.

However, I wish to add that, even if I had found the events to have occurred as testified to by Bauguess, I would not have found that it constituted sufficient proof of misconduct as to warrant the denial of reinstatement to Michaels. For, the issue here is not whether or not Michaels committed *any* misconduct which was first learned of by Respondent only after it discharged him. The issue is whether or not, if that misconduct occurred, it was of the sort that would warrant the conclusion that, had Respondent known of it when it occurred, he would have been discharged for it when it occurred.

I cannot strain this gnat so finely as to reach any such conclusion.

If I had found that the conduct occurred (which, I repeat, I do not), I would also have found that it was of no economic threat or consequence to Respondent. Instead, it was a single, isolated, remote in time, trifling matter. It was of no substantial monetary benefit to Michaels. So far as is known, it has never been repeated. So far as is known, it was regarded by those who had knowledge of it (including Guard Force's supervisor, Drabek), as being unworthy of further mention. Indeed, it seems to me that the claimed seriousness of this "offense" is substantially undercut by Longtin's benign attitude toward Drabek and/or Bauguess. As we now know by virtue of his own admissions, he has made no request or demand that either of them be disciplined by Guard Force. The fact that Longtin has taken absolutely no action against either of them, while at the same time he argues that the person who participated with them in the alleged misconduct, speaks volumes.

Thus, summarizing, I find and conclude that Respondent has failed to prove that Michaels engaged in misconduct so as to warrant denying him the normal remedy of reinstatement to his former position of employment, with all its rights and privileges, and with full backpay. Accordingly, I shall enter an appropriate order requiring that he be reinstated on proper terms.

CONCLUSIONS OF LAW

1. The Respondent, Mojave Electric Cooperative, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, International Brotherhood of Electrical Workers, Local 769, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) and (3) of the Act by discharging its employee, Richard Michaels, because he had engaged in protected and/or union activities.

4. The above unfair labor practices have an effect on commerce as defined in the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that employee Richard Michaels was unlawfully discharged, Respondent is ordered to offer him immediate reinstatement to his former position, displacing if necessary any replacement, or to a substantially equivalent position, without loss of seniority and other privileges. It is further ordered that Richard Michaels be made whole for lost earning resulting from his discharge, by payment to him of a sum of money equal to that he would have earned from the date of his suspension to the date of his return to work, less net interim earnings during that period. Backpay shall be computed in the manner prescribed by *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).[16] Interest on any such backpay shall be computed as in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

It is further ordered that the Respondent expunge from its records any references to the discharge mentioned, and provide Richard Michaels written notice of such expunction, and inform him that the Respondent's unlawful conduct will not be used as a basis for further personnel actions against him.[17]

[Recommended Order omitted from publication.]

[16] See generally *Isis Plumbing Co.,* 138 NLRB 716 (1962).

[17] See *Sterling Sugars, Inc.,* 261 NLRB 472 (1982).